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IN THE

Supreme Court of the United States

October Term 1966

No. 1299

FLAXMAN, COLEMAN, GORMAN & ROSOFF,

Petitioners,

vs.

CRULES R. CHEEK, Trustee; etc.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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FLAXMAN, COLEMAN, GORMAN & ROSOFF,

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vs.

CRULES R. CHEEK, Trustee, etc.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 31, 1966.

Opinion Below.

No written opinion was filed by the District Court herein. The opinion of the Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court herein, is attached hereto as Appendix "A".

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

Questions Presented.

I.

Are all Orders of a Referee in Bankruptcy subject to the provisions of Section 39c of the Bankruptcy Act? (11 U.S.C. §67c.)

II.

What Orders, if any, of a Referee in Bankruptcy, are not subject to the provisions of Section 39c of the Bankruptcy Act? (11 U.S.C. Sec. 67c.)

III.

Are Orders of a Referee in Bankruptcy upon applications for compensation which are noticed to creditors pursuant to Section 58a of the Bankruptcy Act (11 U.S.C. Sec. 94) subject to the provisions of Section 39c of said Act?

IV.

Are the Orders of a Referee in Bankruptcy subject to the doctrine of laches, preventing such Orders from being altered after an unreasonably long time and without a finding of fraud or other conduct which would make such doctrine inapplicable?

V.

Is a Referee in Bankruptcy barred from altering an Order authorizing payment of fees after the lapse of one year from the date of entry of such Order?

Statutes Involved.

The statutes involved in this matter are Sections 39c and 58a of the Bankruptcy Act, 11 U.S.C. 67(c) and 94a respectively, and Rule 60(b), Federal Rules of Civil Procedure. These sections are set forth in Appendix "B" hereof.

Statement.

On May 2, 1960, the following three, related business bankruptcy proceedings were filed: Ward Bros. Furniture, Inc., No. 109,629-Y, Ward Bros. Furniture, a partnership, No. 109,630-Y, and Inland Furniture Inc., No. 109,634-Y. Also filed on the same date were the three cases of the individual principals: Carl Eugene Ward, No. 109,631-Y, Beryl Roy Ward, No. 109,632-Y, and Helen M. Ward, No. 109,633-Y.

Petitioners law firm, then known as "FLAXMAN AND COLEMAN" represented the Receiver of each of the three business cases, Crules R. Cheek, from May 9, 1960, the date of entry of Orders authorizing such employment, to May 25, 1960, the date of the First Meeting of Creditors, at which meeting Crules R. Cheek became Trustee in said cases.

On March 17, 1961, Petitioner filed its verified application for compensation setting forth the services it rendered as attorneys for Receiver [R. p. 72]. A hearing upon such application was had on October 10, 1961, pursuant to notice to creditors. At said hearing no opposition was raised to Petitioner's application and the matter was submitted upon said application. An Order of Court made October 23, 1961 awarded the sum of $2,000.00 to Petitioner as attorneys for the Receiver [R. p. 79-A] which sum was paid to Petitioner on October 24, 1961. The Receiver became Trustee on May 25, 1960 and on May 31, 1960 an Order was made authorizing the Trustee to employ Petitioner as his attorneys [R. p. 50]. On June 4, 1963, Petitioner filed an application for fees as counsel for Trustee [R. p. 80]. Thereafter, the Honorable Russell B. Seymour, Referee in Bankruptcy, replaced the Honorable Oliver M. Char-

leville, Referee in Bankruptcy, as the Referee in this matter. On December 20, 1963, the Honorable Russell B. Seymour, on his own motion, ordered that there be a hearing on January 17, 1964 for the purpose of reconsidering the Order of Referee Oliver M. Charleville of October 23, 1961 and also to consider the application for fees by Petitioner as attorneys for the Trustee, filed on June 4, 1963 [R. p. 92]. At the hearing on January 17, 1964, Petitioner was represented by Sigfried Levitt, who objected to the reconsideration of the Order of October 23, 1961. On March 23, 1964, Referee Russell B. Seymour filed his Findings of Fact, Conclusions of Law, and Orders wherein he concluded that the objection to a reconsideration of the Order of October 23, 1961 ought to be overruled and ordered that the fees awarded to Petitioner as attorneys for the Receiver be reduced to $250.00 and that Petitioner pay to the Trustee such amount by which said fees were reduced [R. p. 123].

A review of said Order of Referee Seymour was taken to the Judge of the United States District Court for the Southern District of California, Central Division, said Court, the Honorable Leon R. Yankwich presiding, approved and adopted the Findings of Fact and Conclusions of Law of Referee Seymour and affirmed said Order without a written opinion.

An appeal was taken to the Court of Appeals for the Ninth Circuit, under 28 U.S.C. 1291. The appeal was argued and on January 31, 1966 an opinion was rendered affirming the Order appealed from.

Reasons for Granting the Writ.

I.

The decision below is in clear conflict with at least one other Circuit Court decision as to the Orders of a Referee in Bankruptcy subject to the provisions of Section 39c of the Bankruptcy Act.

The effective holding of the decision below is that an Order of a Referee determining fees and authorizing their payment is an administrative Order subject to reconsideration or a re-examination by the Referee or his successor in office until the Bankruptcy estate is closed and that the provisions of Section 39c of the Bankruptcy Act are not applicable to such Orders.

The United States Court of Appeals for the Sixth Circuit, on October 7, 1965, held that Orders of a Referee in Bankruptcy become final upon the lapse of ten days after their entry unless a Petition for Review shall be filed within said ten days. *In re Sunningdale Country Club,* 351 F. 2d 139 (142-3). This holding clearly conflicts with the decision of the Ninth Circuit in the within case as it is stated above.

While that case did not deal with an Order determining fees and authorizing their payment, it did involve an Order approving the final account of the Trustee and an Order confirming the sale of real property. Although, with a respect to the Order confirming the sale of real property, a review was taken, the Court's opinion seems clear that the Order would have become final, as did the Order approving the final account, at the end of the ten day period prescribed by Section 39c.

Notice to creditors is required by Section 58a with respect to all accounts filed by a Trustee and for which

confirmation is asked (Sec. 58a, sub. (5)), and on all proposed sales of property (Sec. 58a, sub. (4)). The same section requires notice to be sent to creditors of all applications for compensation. (Sec. 58a, sub. (8)).

Certainly, a Trustee's account is no less an "administrative" matter than is the determination of fees for counsel rendering services in the Bankruptcy proceedings and should be subject to the control of the Court within the limits of the law.

Most importantly, there is no statutory authority for the exemption of "administrative" Orders from the provisions of Sec. 39c. Such exemption, if there is an exemption, is a product of case law and, as indicated by *In re Sunningdale Country Club,* is not uniformly recognized throughout the various Federal Courts.

II.

The question of the effect of the 1938 Amendment to Sec. 58a and the subsequent 1960 Amendment to Sec. 39c upon Orders determining fees and authorizing their payment has not previously been decided by this court and is a matter of first impression.

III.

The question of the finality of a Referee's Orders is of utmost importance with respect to the practice before the Bankruptcy Courts.

ARGUMENT.

I.

Introduction — Are There Administrative Orders.

The Bankruptcy Act does not provide for the categorization of Orders into "administrative" and "non-administrative" Orders. By case law, as cited hereafter, Courts have created this distinction. Petitioner contends that such a classification is improper. Certainly, if there was such a classification, then by reason of the 1960 Amendment to Section 39c of the Bankruptcy Act (11 U.S.C. 67) and additionally with respect to awards of fees, the 1938 Amendment of Section 58a of the Bankruptcy Act, such classification has become a nullity.

The Sixth Circuit, in the matter of *In re Sunningdale Country Club,* held that an Order approving a Trustee's final account became final ten days after its entry in the absence of a review being taken from such Order. This obviously reflects an attitude that regardless of whether a matter is such that the Court wants to keep close control over it, the applicable rule of law is Section 39c and its provisions regarding finality of an Order must be honored.

Later, in the Argument, Petitioner will point out the right of the District Court, on its own discretion, prior to the 1939 Amendment to Section 39c, to hear cases on review after the lapse of ten days after the entry of such Order. That discretion is a key factor necessary to an understanding of how this categorization could have come about and been upheld. At this point, it is only necessary to point out that with the power in the District Court to hear matters at their own discretion, there was virtually no finality to a Referee's Order and all

Orders of a Referee, of any kind, were, therefore, always open for review without distinction. Since this was true whether such orders were "administrative orders" or otherwise the terminology was, therefore, one of convenience and not of art.

For the purpose of removing the District Court's discretion and to create certainty as to the finality of Orders, the 1960 Amendment to Section 39c was passed. A reading of the Section clearly indicates that all Orders are encompassed and affected by its terms as no exceptions are provided for nor does any other Section of the Bankruptcy Act or Federal Rules of Civil Procedure create an exception as to "administrative orders."

II.

The Order in Question Is Subject to the Provisions of Section 39c and Became Final Ten Days After Its Entry.

Assuming, *arguendo,* that there properly exists a classification of Orders known as "administrative orders," Petitioner contends first, that the Order of Referee Charleville of October 23, 1961 is not such an Order, and, if said Order is found to be such an "administrative order", second, that the Amendments hereafter discussed removed the Order of Referee Charleville from such classification and put them within the coverage of Section 39c.

Section 39c was amended in 1960 to provide that unless a person aggrieved shall petition for review or extension within the ten day period, the Order of the Referee shall become final. (Report of the Senate Committee on the Judiciary, No. 1689, June 24, 1960). Consequently, since the 1960 amendment, failure to file

a petition within the time allowed makes the Referee's Order final and not reviewable. (*In re Consolidated Retail Stores, Inc.* (D.C. N.Y. 1957), 157 F. Supp. 490; *In re Leatherhide Industries, Inc.* (D.C. N.Y. 1960).

The term "administrative order" is a characterization of a type of Order or of an Order resulting from a particular type of proceeding. *2 Collier on Bankruptcy,* 1482, points out that Section 39c does not apply to those Orders characterized as "administrative." The author states that "Decided cases indicate that only such orders as are entered 'informally and without notice or hearing' are subject to revision and review outside of Section 39c . . ." *2 Collier on Bankruptcy,* 1483.

The case of *Fazakerly v. E. Cahn's Sons Company, et al.,* 75 F. 2d 110 (1935), C.C.A. 5th Cir., is an oft cited case indicating the difference between Orders subject to the requirements of Section 39c and Orders not covered by said section. One ground of appeal was the failure to file a petition for review within the ten day period. The opinion states that proceedings in bankruptcy are in their major aspects administrative and are intended to be and are usually carried out informally and, further, that it is not to Orders such as the one therein involved, entered "informally and without notice or hearing," that the rules sought to be invoked apply. Indicating the type of Orders to which the rules apply, the Court stated,

> "For it is perfectly clear that the ten-day rule quoted above applies only to formal Orders of the Referee, entered upon *hearing and notice* and as to those who, parties to the proceeding, know or have notice of the entry of the Order. (Emphasis added)."

This formulation as to which Orders were subject to the ten-day rule of Section 39c came into being prior to the amendments of 1938 to the Bankruptcy Act by which Section 58a of the Act (11 U.S.C. 94) was amended to provide that applications for compensation were to be noticed to the creditors of the bankrupt. Since it is from the pool of funds from which the creditors are to receive their dividends, that such compensation is paid, the creditors have an interest adverse to that of the petitioning counsel with respect to such compensation. Thus, having such adverse interest, being put on notice of the petition for fees, there being noticed a hearing and an Order entered thereon, it appears that the nature of proceedings with respect to such petition for fees has become an adversary proceeding and the nature of the Order entered thereon is no longer "administrative." Although the effect of the 1938 amendment has not been judicially decided, it is interesting to note that all post-1938 cases referring to such Orders as "administrative" rely ultimately on pre-1938 decisions. The effect of the 1938 amendment to Section 58a has not gone unnoticed and *2 Collier on Bankruptcy,* 1485, points out as follows:

> "It should be noted, however, that Section 58a(8), as amended in 1938, requires notice to creditors of 'all applications by receivers, ancillary receivers, marshals, trustees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made.' This provision, by putting all interested parties on notice, may cause the allowance of compensation to be considered an adversary proceeding, with a review thereof exclusively designated by Section 39c."

Although Collier goes on to say:

> "It should be remembered further, however, that attorneys are considered officers of the Court, and that judicial control over their compensation will be guarded."

There is no indication that such guarding includes the right to, *sua sponte,* inquire into Orders at any time. It will be pointed out later in this argument that the purpose of the Amendment to Section 58a must have been to allow such Orders to be made with the Referee hearing the petitioning party as well as any objections, to the end that a proper and final Order may be made. Under such circumstances, an uncontrolled right to reconsider such Orders is unnecessary and contrary to the legislative design behind the amendments.

The 1938 amendment to Section 58a can be traced back to 1924. *In re Plymouth Rubber Co.,* 298 Fed. 598 (1st Cir. 1924), deals with a Petition to Review taken from the District Court's Order holding that the matter of fees to appraisers was open to reconsideration. Although the holding affirming the District Court is based on the finding that the first Referee to whom the case was assigned did not, in fact, make any Order thereby prohibiting the Referee to whom the case was presently assigned from making his order, the Court states,

> "But, of more importance, no Referee has power, without notice to creditors, thus to allow expenses against a bankrupt estate, which estate, in the ordinary case, belongs to the creditors, after paying the expenses of administration."

Referring to Sections 62 and 58 of the Bankruptcy Act, the Court indicates those sections to be

> "express provisions declaratory of the fundamental and familiar principle that the beneficial owners of an estate are entitled to be heard as to the expenses of administration chargeable against the estate."

In re Lahongrais, 5 F. 2d 899 (1st Cir. 1925), is concerned with an objection by creditors to an award of fees made without notice to creditors and points out that General Order 42 promulgated by the Supreme Court, April 13, 1925, requiring notice to creditors and a hearing at a meeting of creditors upon petitions for compensation by attorneys was "a recognition and confirmation of the decision in In Re Plymouth Rubber Co., . . ."

Where the existence of an adverse interest is acknowledged, and it is required that provision be made for such interest to be put on notice and a forum provided for it to express objection, if any there be, prior to the making of an Order by the Court, it cannot be said, whether or not objection is raised, that the Order made by the Court is an "administrative order."

The above authorities amply indicate that petitions for compensation, while matters administrative in nature, are of such vital importance to the creditors of the estate as not to be the subject of "administrative orders" but must be formally considered so as to allow the adverse interest of the creditors to be expressed.

Although General Order 42 and the subsequent amendment to Section 58 changed the nature of the Order on a petition for compensation to one subject to

the provisions of Section 39c, the effect was greatly hidden by the fact that prior to 1960 it was within the discretion of the District Court to accept and hear a petition for review although it was filed after the ten-day period provided for the filing of same. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, (1942).

In view of this discretion of the Court, there was uncertainty as to the finality of a Referee's Order under Section 39c. Consequently, it made no practical difference, prior to 1960, with respect to District Court action upon a Referee's Order of compensation, whether the Order be classified as "administrative" or not. It was the intent of the 1960 amendment to Section 39c to clear up this confusion and make the Referee's Order final upon lapse of ten days from the date of entry. *Report of the Senate Committee on the Judiciary*, No. 1689, June 24, 1960.

Thus, it was not until the 1960 amendment to Section 39c that the 1938 amendment to Section 58a became important. After 1960, it was necessary to determine whether or not an Order was "administrative" within the limits of the test above referred to, even if it was an Order on an administrative matter, in order to determine the time at which it became final. If the Order was "administrative" then it was subject, during the pendency of the estate, to re-examination. If the Order was not "administrative" then it became final ten days after its entry.

None of the authorities contained in the record hold that the nature of the subject matter controls the determination of whether or not an Order is "administrative," rather, they hold that it is the nature of the pro-

ceedings, *i.e.* informal, without notice, or hearing, that is determinative. Therefore, the effect of requiring notice and having a hearing upon petitions for compensation is to remove them from the realm of "adminstrative" Orders.

Although the record reflects authority decided after the promulgation of General Order 42 and the amendment to Section 58(a) referring to Orders on fee allowances as "administrative," it is important to realize that they all refer to pre-1938 cases for their authority. As pointed out above, the practical effect of this improper categorization was nil and consequently, the erroneous label went undisturbed.

The fact that an erroneous label has been used for a great length of time should not prevent correction, especially when the error is in the application of the law.

III.

The Order of October 23, 1961 Is Not Subject to Being Vacated More Than One Year After Its Entry.

Federal Rules of Civil Procedure, Section 60(b), provides that the Court may relieve a person from an Order but not more than one year after the Order is entered. The case of *Norris v. Camp,* 144 F. 2d 1, holds that Rule 60(b) applies in Bankruptcy cases by reason of General Order 37 making applicable to proceedings in Bankruptcy the Rules of Civil Procedure applicable to the District Court and that after the time period provided for in Rule 60(b) relief can only be obtained by way of a separate civil action in the nature of a bill of review.

Assuming, without conceding any point, that grounds for relief under Rule 60(b) did exist, the Order of Referee Seymour was made more than one year after the Order of October 23, 1961 and, therefore, would violate the limitation provisions of Rule 60(b).

Further, a separate and independent civil action, plenary in nature, which could be undertaken to obtain relief after the one year limitation period of Rule 60(b) was not attempted in this matter.

Despite the claim that "administrative orders" are always open for review, the case of *Cromelin v. Markwater,* 181 F. 2d 948 (a Fifth Circuit case which was approved in the Third Circuit in the *Matter of Grammes,* 324 F. 2d 675), held that petitions to have a Referee set aside Orders confirming sale, approving the Trustee's accounts, discharging the Trustee, etc., which Orders were more than one year old, were not timely filed. The Court stated that timely filing was "of the essence of a motion for relief under Rule 60(b) . . ."

IV.

After the Lapse of a Reasonable Time, an Award of Compensation Should Be Deemed Final and Should Not Be Disturbed.

An attorney representing a Receiver or Trustee in bankruptcy has, in most instances, no indication of the fee he is to receive for his services. Not only is he not assured of a "flat fee" or an hourly rate, but he does not even have a "contingent fee" agreement tying his fee to a certain percentage of the anticipated recovery. The normal employment of counsel is under agreement that the attorney shall be paid such sum as

the Referee shall deem reasonable, such sum to be paid out of the assets of the estate, if any.

As a result, it is usually at least one year before any compensation is obtained. During this period of time, counsel must still pay for the running of his office, a portion of which expense is applicable to his services in the bankruptcy matter and for which he has not yet received any compensation. In fact, regardless of his efforts, counsel may receive no compensation if the estate is without assets.

Notwithstanding this hardship with respect to fees, the Court below held that a fee award is subject to revision during the pendency of the estate. Consequently, after finally receiving his compensation, the attorney must still be in doubt as to his fee because, at any time, the Court may change its mind and ask for the return of a portion of the fee. At what point can an attorney, who in good faith obtained a fee, feel free to use it to pay his bills and support his family?

If correct and carried to its logical extreme, this would mean that a fee award is not final, and the estate would have some residual interest in the fee. Counsel, being aware of the law, would be a trustee of sorts with regard to such residual interest of the estate in the fee. Under such circumstances, it would not be unreasonable to require counsel to place the fee in his trustee account pending finality of the award.

The record does not indicate that Referee Charleville made any break-down of the individual services being compensated when making the Order awarding fees. Thus, in the absence of any showing to the contrary, it is presumed that Referee Charleville acted properly and

compensated those services entitled to payment. *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F. 2d 87.

Certainly, if anyone could judge the nature of the services rendered, it would be Referee Charleville and it was for him to decide whether or not such services should be compensated and at what amount. It is pure conjecture for a third person to hold that in making his decision, Referee Charleville did not properly segregate the professional and non-professional services rendered by Petitioner.

Conclusion.

For the foregoing reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Dated, this 25th day of April, 1966.

Respectfully submitted,

FLAXMAN, COLEMAN, GORMAN & ROSOFF,
By HOWARD L. ROSOFF,
Petitioner.

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19,863

FLAXMAN, COLEMAN, GORMAN & ROSOFF,

Appellants,

vs.

CRULES R. CHEEK, Trustee of the Estate of Ward Brothers Furniture, Inc., Bankrupt,

Appellee.

No. 19,864

FLAXMAN, COLEMAN, GORMAN & ROSOFF,

Appellants,

vs.

CRULES R. CHEEK, Trustee of the Estate of Ward Brothers Furniture, a partnership, Bankrupt,

Appellee.

No. 19,865

FLAXMAN, COLEMAN, GORMAN & ROSOFF,

Appellants,

vs.

CRULES R. CHEEK, Trustee of the Estate of Inland Furniture, Inc., Bankrupt,

Appellee.

[January 31, 1966]

Opinion of the United States Court of Appeals for the Ninth Circuit.

On Appeals from the United States District Court for the Southern District of California, Central Division.

Before: JERTBERG and MERRILL, Circuit Judges, and TAVARES, District Judge.

JERTBERG, Circuit Judge:

Before us is an appeal from an order of the United States District Court for the Southern District of California, Central Division, affirming the orders of the referee in bankruptcy allowing compensation for legal services rendered by appellants as attorneys for apellee, as receiver, in three related and consolidated bankruptcy cases in the amount of $250.00, and ordering the appellants to pay to the appellee as trustee the sum of $1,750.00.

The District Court had jurisdiction under 28 U.SC. § 1334, and this court has jurisdiction under 28 U.S.C. § 1291.

It appears from the record that on May 2, 1960, three related business bankruptcy proceedings were filed; on May 9, 1960, appellants' law firm, then known as "Flaxman and Coleman" were appointed attorneys for the appellee who was then serving as receiver in said proceedings; on May 25, 1960, appellee was appointed trustee in said proceedings, and the services of appellants as attorneys for the receiver terminated; during such period one Sigfried Levitt, then an an associate of the law firm, rendered the services on behalf of appellants; Mr. Levitt's services, for which he kept no time records, consisted of: (a) checking of the unpaid balance due on an automobile, (b) reading the related bankruptcy schedules, and (c) conducting the sale of the assets of the estates, for which he acted as auctioneer. The claimed compensation of appellants for legal service was not based upon any "rate" but primarily on a claimed $7,000.00 higher return from the sale of the assets. Funds of the estates were derived solely from the sale of the assets.

On May 17, 1961, appellants filed their application for compensation setting forth the services they rendered as attorneys for the receiver. After notice to creditors as prescribed by Section 58(a)(8) of the Bankruptcy Act [11 U.S.C. § 94] a hearing on such application was had on October 10, 1961, before Referee in Bankruptcy Charleville, who later resigned his office and was succeeded by Referee Seymour. An order was made by the referee awarding to appellants the sum of $2,000.00 for their services as attorneys for the receiver. Such amount was paid to applicants on October 24, 1961. No creditors appeared at the hearing, no evidence was taken at the hearing, and there was no opposition at the hearing to the allowance of the compensation award.

On December 20, 1963, Referee Seymour, on his own motion, set a hearing for January 17, 1964 for the purposes of:

(1) Reconsidering Referee Charleville's order of October 23, 1961, allowing to appellants the compensation above mentioned; and

(2) Considering appellants' further application for fees as attorneys for appellee as trustee.

Notice to creditors of said hearing was given. At said hearing Mr. Levitt objected to the reconsideration by Referee Seymour of Referee Charleville's order. Testimony of Mr. Levitt and the appellee was taken. On March 23, 1964, the referee caused to be entered his findings of fact, conclusions of law and orders which, in substance, allowed appellants a fee in the sum of $250.00 as attorney's fees for the receiver and surcharged them $1,750.00, being the difference between the $250.00 fee and the sum of $2,000.00 previously

paid under Referee Charleville's order. Appellants were given credit against said surcharge to the extent of $400.00 representing the fee allowed to appellants as attorneys for the trustee.

On November 10, 1964 the District Court on petition for review affirmed the orders of Referee Seymour and approved and adopted findings of fact and conclusions of law made by him.

Appellants' main contention on this appeal is that referee Seymour was without power to reconsider Referee Charleville's order for the reason that such order became final ten days after its entry under § 39(c) of the Bankruptcy Act [11 U.S.C. § 67] which provides in the part pertinent to this appeal:

> "Unless the person aggrieved shall petition for review of such order within such ten-day period or any extension thereof, the order of the referee shall become final."

This quoted provision was added to § 39(c) in 1960.

Appellants' premise is that as § 58(a)(8) of the Bankruptcy Act, since its amendment in 1938, requires that creditors shall have at least ten days' notice by mail of

> "all applications by receivers, ancillary receivers, marshals, trustees, committees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: * * *"

such quoted provision makes an order awarding attorney's fees subject to review only under the provisions of the 1960 amendment to §39(c) of the Bankruptcy Act. From such premise appellants argue that since no petition for review of Referee Charleville's order was taken within the ten day period, his order became final.

Appellants concede that they have been unable to find any decision of trial or appellate courts supporting their views as to the effect of the 1938 amendment to §58(a). Appellants likewise concede that the authorities cited and relied upon by the appellee support his position that the order in question is an administrative order subject to reconsideration and reexamination by the referee until the estate is closed. See *Matter of Pottasch Bros. Co., Inc.*, 79 F.2d 613 (2nd Cir. 1937); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935).

As above noted, the hearing by Referee Charleville on appellants' petition for compensation was informal. No issues of fact or law were framed, no testimony was taken, and no findings of fact or conclusions of law were made. In our view such order was purely an administrative order subject to reconsideration and re-examination by Referee Charleville or his successor in office, Referee Seymour, until the bankruptcy estates were closed. Referee Charleville's order was not a final one to which the 1960 amendment to § 39(c) of the Bankruptcy Act applies.

Appellants further contend that should we find that Referee Charleville's order did not become final and was subject to reconsideration by Referee Seymour, that the orders made by Referee Seymour constitute an abuse of discretion. We are unable to agree. We have examined the record in this case. We find that the findings of fact of Referee Seymour are fully supported. We are bound by the rule that the findings of fact of the Referee in Bankruptcy must be adhered to unless they are found to be "clearly erroneous." *General Order in Bankruptcy No. 47; Tepper v. Chichester*, 285 F.2d 309 (9th Cir. 1960), Rehearing Denied, Feb. 1, 1961.

The order appealed from is affirmed.

APPENDIX B.

Section 39 c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

Section 58. Notices. a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of (1) all examinations of the bankruptcy, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: *Provided,* That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked,

and the time when they will be examined and passed upon; (6) the proposed compromise of a controversy unless the court, for cause shown, directs that notice be not sent; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act; and (8) all applications by receivers, ancillary receivers, marshals, trustees, committees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: *Provided, however,* That where a creditors' committee has been appointed pursuant to this Act, the notice required by clauses (1), (4), and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

Rule 60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. . . .

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

FLAXMAN, COLEMAN, GORMAN & ROSOFF,

Petitioners,

vs.

CRULES R. CHEEK, TRUSTEE, ETC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is set forth as "Appendix A" in the Petition for Writ of Certiorari herein. As noted in said Petition at page 1, no written opinion was filed by the District Court.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED.

Whether the 1938 amendment to Section 58a of the Bankruptcy Act (11 U.S.C., Sec. 94) and/or the 1960 amendment to Section 39c of said Act (11 U.S.C., Sec. 67) changed the rule that Courts of Bankruptcy may reconsider their administrative orders, including fee allowances, *sua sponte,* at any time during pendency of the particular bankruptcy proceeding.

STATUTES INVOLVED.

Sections 58a and 39c of the Bankruptcy Act, *supra,* are set forth in the Petition in "Appendix B", It is Respondent's position that Rule 60(b), Federal Rules of Civil Procedure, also set forth in Petitioners' "Appendix B", has no relevance, since it obviously relates to relief from mistakes, inadvertence, etc., sought by *a party* prejudiced thereby, and *not* to the reconsideration of an order *by the Court on its own motion,* the situation involved in the instant case.

Additionally relevant herein is Section 1(9) of the Bankruptcy Act(11 U.S.C., Sec. 1), which provides:

> " 'Court' shall mean the judge *or the referee of* the court of bankruptcy in which the proceedings are pending." (Emphasis Added).

ARGUMENT.

I.

The Rule Applied by the Court Below Has Been Enunciated in Every Appellate Decision in Which the Issue Has Been Presented.

As noted by the Court of Appeals at page 5 of its opinion, Petitioners have been unable to cite a single decision supporting their "interpretation" of the amendments to Sections 58a and 39c, *supra,* of the Bankruptcy Act. Furthermore, all courts confronted with the issue have held, without exception, that courts of bankruptcy may reconsider their own administrative, fee allowances, on their own motion, at any time as long as the proceeding remains open. (*In re Lahongrais* (1st Cir., 1925), 5 F. 2d 899; *In re H. L. Stratton, Inc.* (2nd Cir., 1931), 51 F. 2d 984; *Goodman v. Street* (9th Cir., 1933), 65 F. 2d 686; *Re Stillwell* (6th Cir., 1926), 12 F. 2d 205; *Re De Ran* (6th Cir., 1919), 260 Fed. 732). Such inherent power to reconsider their own orders, ***sua sponte,*** is possessed by Referees as well as District Judges, since the former are, by statutory definition (Section 1(9) of the Bankruptcy Act, *supra*), "courts of bankruptcy." (*Matter of Pottasch Bros. Co., Inc.* (2nd Cir., 1937), 79 F. 2d 613, 101 A.L.R. 1182; *McCallum v. Stern* (6th Cir., 1928), 23 F. 2d 2d 491; *Fazakerly v. E. Kahn's Sons Co.* (5th Cir., 1935), 75 F. 2d 110). For a far "harsher" application of the rule than the facts involved herein, see *In re H. L. Stratton, Inc., supra,* in which attorneys for a receiver in bankruptcy were surcharged for $15,000.00, which they had received almost four years prior to the decision.

The rule obviously is predicated on sound policy considerations which dicate that courts of bankruptcy be accorded considerable latitude in respect to their fee allowances and other administrative orders, to enable them to rectify precisely the kind of gross over-allowance as was originally made in the instant case, and this power should exist irrespective of whether the over-allowance was the result of fraud, inadvertence, or even the court's own initial negligence.

Finally, the recent decision cited by Petitioners, viz.: *In re Sunningdale Country Club* (6th Cir., 1965), 351 F. 2d 144, in no wise conflicts with the rule applied herein. In the first place, the case involved so unique a series of "vexatious" and abortive appeals, reviews, motions, etc., as to render the case virtually *sui generis;* however more important, the court merely held that *an adverse party* who had failed to seek timely reviews from various orders of a Referee in Bankruptcy, was precluded from having the orders reviewed long after the time therefor had elapsed. This situation is patently distinguishable from a court's exercise of its power to reconsider its own fee allowances on its own motion, while the proceeding is still pending.

In the above connection, Respondent conceded in his brief filed with the courts below, that *had* some creditor formally objected to Petitioners' fee request, and *had* there been a true adversary proceeding conducted as a consequence, with findings of fact, conclusions of law and an order entered allowing the requested fees, that objecting creditor, and possibly all others as well, would have been precluded from any attempt to reopen the matter after the statutory period for review had elapsed, except for the reasons specified in Federal

Rules 59 or 60. However, even in such circumstances, it by no means follows that *the court* would be similarly precluded, although doubtless as a practical matter, a court would be far less likely to reconsider an allowance made following a truly contested proceeding than in the situation where, as here, there was not only no contest, but likewise no evidence or findings of fact or conclusions of law.

II.

Neither of the Amendments to the Bankruptcy Act Urged by Petitioners, Changed, or Was Intended to Change, the Rule That Fee Allowances Are Subject to Reconsideration by the Court on Its Own Motion, at Any Time During Pendency of the Proceeding.

The central flaw in Petitioners' mechanical "interpretation" of the 1938 amendment to Section 58a, and the 1960 amendment to Section 39c of the Bankruptcy Act, is that it wholly ignores all established rules of statutory construction, including the most important, viz.: ascertaining and adhering to the intent of the legislature, in this case, of course, that of Congress. That the cardinal rule of statutory construction is the effectuation of the intention of the legislature is too well settled to admit of the slightest doubt. (*United States v. N. E. Rosenblum Truck Lines,* 315 U.S. 50, 86 L. Ed. 671, 62 S. Ct. 445; *United States v. Stone & D. Co.,* 274 U.S. 225, 71 L. Ed. 1013, 47 S. Ct. 616; 50 Am. Jur., Statutes, Sec. 223, p. 200). A corollary rule is that "nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself". (50 Am. Jur., Statutes, Sec. 229, p. 214; *Yu Cong Eng. v. Trinidad,* 271 U.S. 500, 70 L. Ed. 1059, 46 S. Ct. 619; *Howard v. Illinois*

Cent. Ry. Co., 207 U.S. 463, 52 L. Ed. 297, 28 S. Ct. 141).

The following further rule of statutory construction, set forth in 50 Am. Jur., Statutes, Sec. 299, p. 281, is particularly germane:

> "It has even been presumed that the legislature intended that the statute should be construed in the light of settled and uniform policy of the law relating to the subject matter, and that there is no intention to depart from any established policy of the law. *Accordingly, a purpose to effect a radical departure from a firmly established policy will not be implied but must be expressed in clear and unequivocal language,* and such policy is not to be regarded as abandoned further than the terms of the statute and objects of the legislature *unmistakably require.* (Citing, *inter alia: Murdock v. Memphis,* 20 Wall. (U.S.) 590, 22 L. Ed. 429)." (Emphasis Added).

Applying the foregoing rule to the instant case, it is inconceivable that Congress would "inferentially" strike down the long settled policy that courts of bankruptcy are to have, indeed must have, wide control over their own fee allowances, and such sound and firmly established policy cannot be "construed" to have been eliminated unless such intent be expressed in "clear and unequivocal language". Clearly no such language is to be found in either Sec. 58(a)(8) or Sec. 39(c), for the reason that Congress had no intention of affecting such a vital and historic policy.

The purpose of Sec. 58(a)(8) is to accord creditors and other interested parties notice of hearings on fee applications, and, concomitantly, an opportunity to op-

pose the same if so advised. The object of the 1960 amendment to Sec. 39(c) was to preclude belated reviews by *parties* to litigated matters. Neither amendment reflects the remotest intent to strip bankruptcy courts of their inherent, and wholly salutary, power to reconsider their own fee allowances.

Finally, the following, further canon of construction, set forth in 50 Am. Jur., Statutes, Sec. 243, page 238, wholly negates Petitioners' "theory" that the status of fee allowances as administrative orders, has been changed by "implication":

> "The courts may not by implication read into a statute that which is not intended to be there, or make an implication which the language of the statute does not warrant. (Citing footnote No. 11, *inter alia*: *United States v. Merriam,* 263 U.S. 179, 68 L. Ed. 240, 44 S. Ct. 69, 29 A.L.R. 1547). In this respect, the courts often refer to the maxim *'expressum facit cessare tacitum'* (That which is expressed makes that which is implied to cease. *Black's Law Dictionary,* 2nd Ed., p. 468). It has been declared that words may *not* be implied in a statute where there is no necessity for such implication, *and that to warrant an addition to the terms of the statute by way of implication, the presumption of intention to make the statute operate as it does with the added terms must be so strong that the contrary thereof cannot reasonably be supposed."* (Emphasis Added.)

The two-fold answers to the almost lachrymose arguments appearing in Petitioners' brief at pages 15 and 16, are: (1) attorneys who elect to represent receivers and trustees in bankruptcy are fully aware that their fees

will be fixed by the bankruptcy court after rendition of the services, and are further subject to reconsideration so long as the case remains open; and (2) as a practical matter, it is most unlikely that a Referee would even consider surcharging an attorney, or attorneys, for fees previously allowed, either by himself or by a predecessor, except in the case of an egregious over-allowance such as occurred in the instant proceeding, and, furthermore, if an order of surcharge should be made in the absence of clear justification, the District Judge, or Court of Appeals, would undoubtedly reverse the errant Referee rather summarily.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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